licensed radio and television stations in the country had five or more employees, and were therefore required to file EEO Programs with their renewal applications. Of these stations, approximately 20% received *Bilingual* inquiry letters. Approximately 20% of these *Bilingual* stations received some sort of sanction. Thus, only 4% of stations with 5 or more employees (and less than 3% of all stations), were found to have violated technical recruitment or record keeping requirements. Instances of actual discrimination are much rarer. Since the EEO Program was initiated in 1969 only 2 licenses have been revoked, See *Leflore Broadcasting Co.*, 41 RR2d 379 (1977) aff'd *Leflore Broadcasting Co. v. FCC*, 636 F.2d 454 (D.C. Cir. 1980); *Catactin Broadcasting Corp.*, 66 RR 2d 131 (1989), recon. denied, 66 RR2d 1521 (1989), aff'd 1990 WL 212551 (D.C. Cir.), and only 9 licenses have been set for hearing on a discrimination issue, See *Federal Broadcasting System, Inc.* 59 FCC 2d 356 (1976), *Black Broadcasting Coalition of Richmond, VA v. FCC*, 40 RR 2d 815 (U.S. App. D.C 1977), *Central Texas Broadcasting Co., Ltd.*, 47 RR 2d 1449 (Admin. Law Judge 1980), *Metroplex Communications of Florida, Inc.*, 55 RR 2d 886 (1984), *Albany Radio, Inc.*, 56 RR 2d 633 (1984); *Beaumont Branch of the NAACP v. FCC*, 65 RR 2d 367 (D.C. Cir. 1988), designation order on remand, *Pyle Communications of Beaumont, Inc.*, 4 FCC Rcd. 1254 (1989), settlement agreement approved, 67 RR 2d 74 (1989); *WXBM-FM, Inc.* 69 RR 2d 960 (1991); *Dixie Broadcasting, Inc.*, 71 RR 2d 957 (1992); *The Lutheran Church/Missouri Synod*, 74 RR 2d 1070 (1994). Thus, enormous administrative and private resources have been and are being expended to detect violations of recruitment and

referral requirements by less than 3% of all broadcasters and to punish exceptionally rare instances of discriminatory conduct.

A far more efficient way of enforcing the FCC's "public interest" charge to license only those who serve the public interest is to limit its review of EEO violations to adjudicated instances of discrimination. Such an approach is consistent with the approach taken with respect to the "character" qualifications of broadcast applicants. The Commission now relies upon courts of competent jurisdiction to decide whether certain types of criminal, fraudulent or anticompetitive misconduct have occurred, and reserves as a Commission function the determination of whether the misconduct indicates a likelihood that the applicant will deal truthfully with the Commission or comply with FCC. See *Character Qualifications*, 102 F.C.C.2d 1179 (1986).

Such an approach is also consistent with the renewal procedures mandated by The Telecommunications Act of 1996. Section 204(a) of the 1996 Act amends 47 C.F.R. § 309 to require the Commission to grant a renewal application if it finds that the station has served the public interest, convenience, and necessity, has not engaged in "serious violations," of the Act or engages in conduct that constitutes a "pattern of abuse." The Commission presumes a licensee has served the public interest unless a substantial question of material fact is presented to the contrary.

The Commission is warranted in imposing severe sanctions, including possible license revocation, upon a licensee found to have engaged in discriminatory hiring practices. It is not warranted in subjecting the license renewal applications of the entire broadcast

industry to an elaborate and expensive system of review in order to punish two bigots every three decades.

In the absence of any evidence of intentional employment discrimination, the factors identified in the proposed forfeiture guidelines simply do not suggest the sort of "serious violation" or "pattern of abuse" that warrants the denial of an application to renew a broadcast license. Haley Bader & Potts therefore urges the FCC to eliminate its system of "forfeitures" and limit sanctions to those found to have engaged in discriminatory conduct.

Alternatively, if the Commission adopts forfeiture guidelines, Haley Bader & Potts recommends that recruitment and referral violations be treated like any other violations of the Commission's rules. Currently, renewal applications are placed in limbo -- often for years -- while the Commission conducts its *Bilingual* inquiry. Assignments, transfers and refinancings are jeopardized or enormously delayed and licensees subjected to the unnecessary *in terrorem* effect of operating without the assurance of a broadcast license. Much of the inequity of holding a license in abeyance while the Commission determines the nature of a forfeiture could be alleviated by granting renewal, transfer and assignment applications unless an adjudication of discrimination has been made, and subsquently deciding the amount of any forfeiture to be imposed. Such a procedure was followed with regard to allegations of FCC rule violations and anti-competitive behavior raised in a petition to deny the application to transfer control of Capital Cities/ABC, Inc. to The Walt Disney Company. There, the Commission expeditiously granted the transfer of control application, referred allegations concerning rule

violations to the Mass Media Bureau Enforcement Division, and declined to act on allegations of anti-competitive behavior until other enforcement authorities had resolved the issues. See *Applications of Capital Cities/ABC, Inc.*, FCC 96-48 (released February 8, 1996).

In any event, Haley Bader & Potts urges the Commission to simplify the standards proposed for any forfeiture guidelines adopted. Haley Bader & Potts supports the proposal of allowing broadcasters some sort of recruitment "safe harbor." This proposal recognizes the fact that vacancies may reasonably be filled by applicants -- including women and minorities -- who are not "recruited." Walk-in applicants, emergency replacements for a terminated DJ, applicants who submit unsolicited resumes, interns, those who learn of a job opening by word of mouth, all may be qualified "applicants" even if they are not "attracted" through a referral or recruitment source. To the extent that the proposed forfeiture standards recognize the realities of the job market and the limitations of formal recruitment efforts, it is to be applauded.

By contrast, requiring recruitment efforts to produce some "adequate pool" of minority applicants is misguided. Such a requirement not only interjects a new, arcane legal requirement into the forfeiture process, but imposes an unrealistic standard. A broadcaster's recruitment "efforts" may be the least significant factor in attracting applicants for a job opening. Job candidates are affected by a wide variety of factors that have nothing to do with the broadcaster's recrutiment "efforts." These factors include the type of job involved, the condition of the local economy, the location of the main studio, the availability of public transportation, the salary offered, the size, format

and service area of the station. A job listing for a DJ at a popular FM station in New York City may easily attract an "adequate pool" of applicants, while a job opening for a traffic director at an AM station in Billings, Montana may not. The forfeiture policy proposed by the Commission makes no distinction between the two openings. Both are job "vacancies." If the second vacancy does not attract an "adequate pool" of applicants, the Commission assumes that the broadcaster's recruitment efforts were lax.

In its attempt to provide "predictability and certainty" to its forfeiture standards, the FCC has lost sight of the fact that its goal is to encourage broadcasters to make "a good faith effort to employ qualified women and minorities " NPRM, para.2. The proposed forfeiture structure incorporates upward and downward "adjustments" for a wide range of special circumstances, all of which are without regard to the station's basic employment profile.

Haley Bader & Potts proposes that this system be stood on its head. If a broadcaster's employment profile bears a reasonable relationship to the relevant minority population, the broadcaster should be presumed to have made a "good faith" effort. Forfeitures should be considered only when there is creditable, extrinsic evidence that the broadcaster has engaged in intentional discrimination or otherwise not made good faith efforts to employ women and minorities.

III. COMMISSION PROPOSALS

The NPRM recognizes that current EEO requirements "may unnecessarily burden broadcasters, particularly licensees of smaller stations and other distinctly situated broadcasters," and proposes a variety of changes intended to "provide relief to such broadcasters." NPRM, para. 1. Haley Bader & Potts whole-heartedly approves such efforts. If the Commission does not, as recommended above, scale back its EEO Program to one which sanctions discriminatory conduct, Haley Bader & Potts urges the Commission to adopt a number of the remedial revisions discussed below.

To assist the Commission in understanding the burdens imposed by the current EEO Program, and in evaluating which of its proposed modifications may provide significant relief, Haley Bader & Potts invited radio broadcasters to respond to the questionnaire appended as Attachment 2. Although this questionnaire does not claim to conform to principles of scientific design or to produce statistically verifiable results, it collects information which is useful in determining whether particular proposals will actually provide the regulatory "relief" desired. (See *Report* 9 FCC Rcd 6276, 6305).

Haley Bader & Potts received responses from 41 radio and television stations, representing a diverse group of large and small-market stations from across the country. The staff sizes of stations in our survey range from ten to 86 full-time employees, and from Arbitron markets one through 257, as well as unranked markets. Haley Bader & Potts also received numerous responses from stations with five

or fewer full-time employees. As that category of station is not subject to the Commission's EEO recordkeeping and filing requirements, the data from these broadcasters were not included in quantitative responses.

On average, the stations surveyed estimate that they spend approximately 165 hours per year on EEO-related activities, including advertising job openings in the media, determining the race and gender of applicants, preparing annual employment forms, recruiting efforts with educational institutions, contacting minority organizations, and preparing EEO Program Reports and documenting recruitment efforts. Recordkeeping duties were viewed as the most onerous.

1. Qualifying Stations

The Commission seeks comment on what stations should "qualify" for an exemption from EEO reporting and recordkeeping requirements. See NPRM, para. 21. Current policy exempts stations with five or fewer full-time employees. The NPRM proposes several qualifying factors on which to base such a determination. These include (1) station staff size, (2) station market size or (3) the size of the applicable local minority labor force. *Id.*

Broadcasters polled by Haley Bader and Potts overwhelmingly support the use of station staff size as a qualifying factor, and suggest raising the current exemption at least to ten or fewer employees. Many broadcasters support raising the full-time employee exemption to a much greater number. Suggestions range from 20 to 50 or fewer employees.

More than three quarters of those surveyed support the use of a station's market size as a factor in determining whether a station qualifies for reduced EEO recordkeeping and reporting obligations. The

great majority of those supporting a market size factor also support using market size based on population, rather than national ranking, as determined by Arbitron, Nielsen, or some other rating service.

2. Simplified Reporting

Those surveyed strongly endorse the Commission's proposal to require qualifying stations to file only the first page of Form 395-B and Form 396-A, and the first two pages of Form 396. See NPRM, para. 23. Many viewed the proposal as an effective means of eliminating unnecessary administrative burdens, and estimated that it would reduce the amount of time spent on EEO recordkeeping by as much as 50-75%. These stations did not share the Commission's concern that elimination of recordkeeping requirements for qualifying stations would make it difficult for a station to demonstrate compliance with the EEO rules if challenged by an interested party. See NPRM, para. 23. Responses suggest that such a concern is unrealistic, in light of the fact that most stations routinely maintain all job application materials for some period of time, usually for 2-3 years, as a matter of station policy, notwithstanding the Commission's EEO recordkeeping obligations.

3. Recruitment Events Proposal

Broadcasters polled by Haley Bader & Potts gave mixed reviews to the Commission's proposal to give stations the alternative of management-level, in-person participation in a minimum number of recruiting events each year. See NPRM, para. 24. Slightly more than half the surveyed stations indicated that such a proposal would be an effective alternative to the Commission's current requirement that broadcasters contact recruitment sources likely to refer qualified

minority and women applicants. Many small-market stations doubted they would have the opportunity to participate in as many as four recruitment events a year.

4. Employment Benchmark

The Commission invites comment on the adoption of an "employment benchmark" that would exempt broadcasters from maintaining detailed job-by-job recruitment and hiring records as long as a station's overall employment profile is kept at certain levels relative to the percentage of minorities and women in the local workforce. See NPRM, para. 25.

Approximately 60% of broadcasters surveyed indicated strong support for the Commission's benchmark proposal. According to these stations, the amount of paperwork and other administrative responsibilities involved in the recruiting and interviewing process is so burdensome that such a benchmark would reduce a station's administrative efforts by 50 to 80 percent.

5. Central Recruitment Sources/Minority Training and Internship Programs

The NPRM proposes to allow broadcasters to rely on central recruitment sources, such as state broadcast associations, under certain conditions. See NPRM, para. 32. The Commission's proposal was met with great enthusiasm on the part of broadcasters surveyed by Haley Bader & Potts. Almost all stations supported the use of central recruitment sources, and approximately two-thirds believed that such a proposal would significantly reduce current EEO efforts.

The Commission's proposal to give broadcasters credit for participation in other joint recruitment efforts, such as internship and minority training programs, also was popular. More than 70 percent of stations surveyed already offer some form of internship program, and would generally support the award of Commission credit for such efforts. Of stations that do not currently offer minority training or internship programs, more than half expressed an interest in doing so if their efforts were credited by the Commission.

6. Alternative Labor Force Test

The Commission seeks comment on its test for evaluating a licensee's EEO record based on an alternative labor force when MSA or county data would not otherwise be appropriate. See NPRM, para. 35. Under current policy, a licensee can successfully petition the Commission for the use of alternative labor force data only if: (1) the distance of the station from areas with significant minority population is great; (2) commuting from those areas to the station is difficult; and (3) recruitment efforts directed at the MSA minority labor force have been fruitless. *Id.*

Responses to Haley Bader & Potts' questionnaire indicate that 62% believe that MSA or county data accurately reflect the labor force available. Most stations surveyed nonetheless support the use of alternative data if a station's signal contour does not cover significant minority areas of the relevant MSA or county. Stations that support the use of alternative data generally support use of a station's principal community contour (70 dBu for FM, 5 mV/m for AM and Grade A for TV) as the most accurate indicator of a station's market.

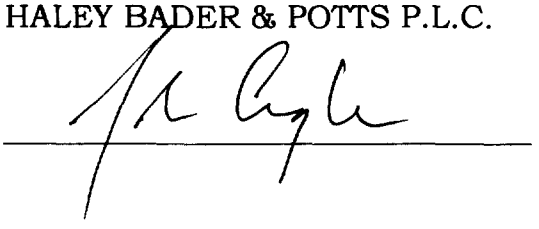
Respondents voiced virtually unanimous support for the Commission's proposal to permit a station to use alternative labor force data if it can demonstrate that "commuting from [an area] to the station is unlikely because of transportation difficulties, or because the station's past recruitment efforts show that prospective employees are unwilling to commute from those areas." See NPRM, para. 35.

CONCLUSION

Haley Bader & Potts urges the Commission to examine its EEO Program in accordance with the strict standards of scrutiny mandated by *Adarand*. It believes that such an examination will result in the scaling back of the EEO Program to the sanctioning of licensees found to have engaged in a course of discriminatory conduct. If the Commission continues to mandate recruitment and referral requirements, Haley Bader & Potts urges the Commission to adopt a number of the modifications proposed. In particular, it urges expansion of exemption thresholds, allowance of new recruitment options, establishment of employment thresholds, and relaxation of the policy permitting use of alternative labor force statistics.

Respectfully submitted,

HALEY BADER & POTTS P.L.C.



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July 10, 1996

ATTACHMENT 1

Before The

Federal Communications Commission

Washington, D.C. 20554

In The Matter Of	)	
	)	
Re-examination of the FCC's Equal Employment Opportunity Program	)	RM Docket No._____
	)	
	)	

TO: The Commission

PETITION FOR RULE MAKING

HALEY BADER & POTTS P.L.C.
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August 18, 1995

SUMMARY

For the past quarter century, the FCC has maintained an EEO program which rests on the predictive judgment that EEO requirements in addition to those imposed by other state and federal law are necessary to increase "diversity" of programming in the broadcast medium. That hypothesis remains untested. The Commission has not defined the goal of "diversity" with any precision, nor established any criteria for determining when diversity is achieved -- either by an individual broadcaster or the broadcast industry as a whole.

Diversity can no longer serve as a talisman. The *Adarand* decision now requires the Commission to undertake a searching examination of its EEO program, to substantiate the presumed relationship between employment practices and programming, and to determine whether the EEO requirements are narrowly tailored to achieve a compelling goal.

Haley Bader & Potts therefore urges the Commission to initiate a rule making as expeditiously as possible.

Before The

Federal Communications Commission

Washington, D.C. 20554

In The Matter Of	)	
	)	
Re-examination of the FCC's Equal Employment Opportunity Program	)	RM Docket No._____
	)	
	)	

TO: The Commission

PETITION FOR RULE MAKING

The law firm of Haley Bader & Potts P.L.C. hereby petitions the Federal Communications Commission to initiate a rule making to review and, as necessary, revise or rescind its rules, procedures, policies, and guidelines for promoting equality of employment opportunity in the broadcast industry (collectively, its "EEO program") in light of the Supreme Court's recent decision in *Adarand Constructors, Inc. v. Pena,* U.S. _____, 63 LW 4523 (June 12, 1995). As discussed below, *Adarand* establishes a new constitutional standard with which all federal classifications systems based on race or ethnic characteristics must comply. The FCC's EEO program has never been evaluated by these criteria.

INTRODUCTION

The need for FCC action is urgent. On July 19, 1995, President Clinton released an Affirmative Action Review that canvassed federal affirmative action programs. The Affirmative Action Review takes *Adarand* into account only to note that: "Several of our conclusions and recommendations . . . must be considered tentative and provisional because the intervening Supreme Court decision in *Adarand*

Constructors, Inc. v. Pena now requires that many such judgments be based on the much more detailed empirical analysis entailed by the constitutional standard of 'strict scrutiny.'" Affirmative Action Review, Foreword. The Affirmative Action Review is further qualified by the fact that its survey of FCC preferences and policies is limited to those designed to increase minority *ownership* of communications enterprises. The Affirmative Action Review does not consider the FCC's EEO program with respect to employment practices. As a result, the Affirmative Action Review raises broad questions about the continuing validity of the FCC's EEO program, but provides none of the "empirical analysis" needed to resolve those questions.

Such questions are more sharply raised in the June 28, 1995 Memorandum of the Department of Justice to the General Counsels of federal regulatory agencies ("DOJ Memo"), which concludes that: "*Adarand* makes it necessary to evaluate federal programs that use race or ethnicity as a basis for decision making to determine if they comport with the strict scrutiny standard." DOJ Memo, p. 34. The DOJ Memo offers an analytic framework that is incorporated in Part III of this Petition.

As both the Affirmative Action Review and DOJ Memo make clear, *Adarand* requires the FCC to re-examine its EEO program under new, exacting criteria. The need for such an examination is made even more urgent by the advent of the renewal cycle for broadcast licenses. The seven-year renewal period for radio stations will begin to expire in October, 1995. See 47 C.F.R. § 73.1020. Petitions to Deny such

applications will be due by September 1, 1995.[1] The continuing validity of the FCC's EEO program will thus soon become a critical issue with respect to scores of license renewal applications likely to be challenged on grounds of inadequate EEO performance.

In order to assure that the EEO requirements being applied to broadcast licensees meet the stringent criteria established by *Adarand*, Haley Bader and Potts urges the Commission to undertake a prompt, thorough review of its EEO program, to invite comments on alternatives to present requirements, and to make necessary changes expeditiously.

I. THE *ADARAND* DECISION

In *Adarand*, a nonminority firm challenged the constitutionality of a Department of Transportation ("DOT") program that compensated prime government contractors who hired subcontractors controlled by "socially disadvantaged" individuals. The principal question considered was the constitutional standard of scrutiny appropriate for federal programs based upon racial or ethnic classifications. The Court held that federal affirmative action programs were subject to "strict" rather than "intermediate" level scrutiny. In order to satisfy such scrutiny, the classification must address a "compelling interest" and be "narrowly tailored" to serve that interest. 63 USLW at 4530.[2]

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[1] Petitions to Deny the license renewal applications of 11 radio stations in the Norfolk, Virginia area have, in fact, already been filed. See *Communications Daily*, p.5 (August 16, 1995).

[2] By contrast, an "intermediate level of scrutiny requires only that the classification serve an "important" governmental interest and be "substantially related" to the achievement of that objective. See *Metro Broadcasting*, 497 U.S. 547,564-565 (1990).

In reviewing the line of cases that construe the Equal Protection component of the Fifth Amendment's Due Process clause, the Court invalidated *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990), which had applied an "intermediate" level of scrutiny in upholding the comparative preference given to minority applicants for broadcast frequencies. *Metro* was overruled to the extent that it was inconsistent with *Adarand's* holding that "all racial classifications, imposed by whatever federal, state, or local governmental factors, must be analyzed by a reviewing court under strict scrutiny." Id. Any EEO program now enforced by the FCC must thus be narrowly tailored to advance a compelling governmental interest.

II. A BRIEF HISTORY OF THE FCC'S EEO PROGRAM

The FCC's EEO policy grew out of the "racial crisis," *Memorandum Opinion and Order and Notice of Proposed Rule Making*, 13 FCC2d 766 (1968), of the 1960s and the "national policy," 13 FCC 2d at 767, articulated in the Civil Rights Act of 1964. On July 3, 1968, the Commission responded to a request that the Commission adopt a rule prohibiting discrimination in employment by broadcast licensees and requiring that: "Evidence of compliance with this section be furnished with each application for a license and annually during the term of each license upon prescribed forms." 13 FCC 2d at 766.

In the Memorandum Opinion and Order portion of its ruling, the Commission noted that, pursuant to Sections 307(a), (d) and 309(a) of the Communications Act, it could grant an application for an FCC authorization only after finding that the "public interest, convenience and

necessity would be served." 13 FCC2d at 768. Thus, even without a rule that specified EEO duties, "a petition or complaint raising substantial issues of fact concerning discrimination in employment practices calls for full exploration by the Commission before the grant of the broadcast application before it." 13 FCC2d at 774.

The Commission expressed doubts as to "whether submission of a showing in this respect by every licensee is any more required than, for example, a showing that the licensee has complied with the Fairness Policy, also a requirement for renewal." 13 FCC 2d at 771. Rather than propose affirmative action requirements, the Commission announced procedures for considering complaints of discriminatory employment practices as grounds for denying a broadcast renewal application.

The related Notice of Proposed Rule Making proposed rules limited to providing those believing they had been victims of discriminatory practices with notice of the right to complain to the EEOC. See 13 FCC 2d at 773.

In the concluding portion of the document, the Commission called for "a commitment going beyond the letter of the policy and attuned to its spirit and the demands of the times." 13 FCC 775. This commitment related not to employment practices, but to the portrayal of minorities in programming:

> This is not a matter on which the Commission can appropriately intervene. The judgment as to whether to use one performer or another or a particular script approach in a particular program is wisely beyond the jurisdiction of the Commission. Rather, all we do is again raise the question in context of the conscience of the broadcaster at this juncture of our national affairs. 13 FCC2d at 775.

The Commission expressly disavowed any goal of redressing the effect of past discrimination:

> We stress that we are not condemning the broadcast media for past actions or neglect. It is fruitless to focus on the past. Nor are we implying that broadcasters or others are not presently engaged in meeting the challenges set out in the [Report of the National Advisory Commission on Civil Disorders]. The thrust of our message is that the nation requires a maximum effort in this vital undertaking and to call upon all broadcasters to make as great a contribution as they can.

13 FCC 2d at 775.

By 1969, the Commission had decided that a rule was a desirable means of demonstrating compliance with its nondiscrimination policy. *Report and Order*, 18 FCC 2d 240 (1969). The Commission concluded that an affirmative action program would "complement, not conflict with, action by bodies specially created to enforce the policy," 18 FCC2d at 243, and that such a program was preferable to a regulatory scheme based upon actual complaints of discrimination. A system based upon individual complaints would be time consuming to administer, would place a heavy burden on individuals to prove the existence of discrimination and would fail to "cope with general patterns of discrimination developed out of indifference as much as out of outright bias." 18 FCC at 242. The Commission therefore proposed detailed requirements for an affirmative action program based upon EEO requirements imposed on for government agencies.

Each station with five or more fulltime employees would be required to submit an Annual Employment Report that provided an

employment profile of the station, and would be required to devise an affirmative action plan that would "assure equal employment in every aspect of station employment practice, including training, hiring, promotion, pay scales, and work assignments." 18 FCC 2d at 244. The plan would "vary with the size of the station and the nature of the community." Id. Further comments were invited on specific requirements.

In May, 1970, the FCC adopted rules similar to those proposed after rejecting arguments that it was "inappropriate for the Commission to act in this area, and particularly to go beyond the 25-employee cut off point adopted by Congress in the Civil Rights Act of 1964." *Report and Order*, 23 FCC 2d 430 (1970). The rules adopted required the filing of Annual Employment Reports and the submission of an EEO plan as part of an application for a construction permit, the assignment or transfer of a license or construction permit, and a ten-point EEO Report with the application to review a broadcast license.

In 1976, the FCC revisited its EEO program requirements, reaffirmed its commitment to "affirmative action" (as opposed to mere avoidance of discrimination) and asserted that "'employment neutrality' was insufficient to correct the problem of underutilization of minorities and women. . . ." *Report and Order*, 60 FCC 2d 226, 228 (1976). In place of an individualized EEO plan, the Commission prescribed a model EEO plan to be followed by all stations with ten or more fulltime employees.[3]

[3] The revision of the rule to exempt stations with 10 (rather than 5) or fewer employees was struck down on grounds that the FCC had insufficiently articulated its rationale

The employment profile at each such station would be examined to determine whether there was a "reasonable representation" of women and minorities, based upon their availability in the workforce. Although the Commission initially refused to define a "zone of reasonableness" in quantitative terms, it subsequently established "EEO processing guidelines"[4] for reviewing renewal applications of stations that failed to meet quantitative standards.

Drawing upon language from a note in *NAACP v. Federal Power Commission*, 425 U.S. 662, 670 n7 (1975), the FCC found that "our regulations concerning discrimination by broadcasters can be justified insofar as they are "necessary to enable the FCC to satisfy its obligation under the Communications Act . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." 60 FCC 2d at 229. Deliberate discrimination in employment was found to be "inconsistent with the responsibility of each broadcaster to make a *bona fide* effort to ascertain and serve all elements of its community." Id. The Commission's role was "that of assuring on an overall basis that stations are engaging in employment practices which are compatible with

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for changing the exemption threshold. See *United Church of Christ v. FCC*, 560 F.2d 529 (2nd Cir. 1977).

[4] See *EEO Processing Guidelines*, 46 RR2d 1693 (1980). Under the Guidelines, stations with 5 to 10 full-time employees would have their renewal applications subjected to heightened scrutiny if minority groups and/or women were not employed at a ratio of 50% of their workforce availability and 25% in the upper-four Form 395 job categories (officials and managers, professionals, technicians and sales); and stations with 11 or more full-time employees would have their renewal applications scrutinized if minority groups and/or women were not employed at a ratio of 50% of their availability in the workforce overall and 50% in top-four job categories. All renewal applications of stations with 50 or more full-time employees would be subject to review; and stations with five or fewer employees would be exempt from the requirement of having a written EEO program.

their responsibilities in the field of public service programming." Id. at 230.

In 1987, the Commission adopted what came to be called the "efforts" test of compliance with EEO requirements. Under this test, a licensee's EEO performance was subjected to a two-step procedure. "The first step will be to make an initial evaluation of a station's effort's based on the full range of information available concerning its EEO record." 2 FCC Rcd 3974. This record included the broadcaster's EEO program, EEO complaints filed against the station, the composition of the station's workforce as submitted on its Annual Employment Reports, and the composition of the workforce in the station's area. If the initial evaluation indicated that a station's efforts fell outside a "zone of reasonableness," the station would be subjected to a second-step investigation of those areas of responsibility where its efforts are deficient. 2 FCC Rcd 3974. Prior "quantitative tests" of EEO performance were rejected to the extent they constituted "safe harbors." Id.

In February 1989, the Commission issued a *Memorandum Opinion and Order* clarifying the procedures to be followed in completing the Equal Employment Opportunity Program Report (FCC Form 396) submitted with an application for license renewal. The *Memorandum Opinion and Order* focused on the requirements for documenting "applicant flow," 4 FCC Rcd 1715.

> Specifically, we have asked licensees for a list of those hired as well as those who applied for each job filled during a particular period of time, identifying each applicant by referral source, sex, and race or national origin. When applicant flow data were not kept by a licensee or when a licensee could not determine whether its efforts

resulted in any minority or female referrals, we held the program deficient.

4 FCC Rcd at 1715.

The Commission left no doubt that broadcasters were required to identify all job referrals by race and gender: "[W]e do not see how a licensee, or the Commission, could possibly assess, as required, whether a sufficient number of qualified women and minorities were applying for available positions, if the licensee had no idea as to how many, if any, women and minorities were applying for such positions." 4 FCC Rcd at 1716.

Two pending proceedings involve the FCC's EEO program. In February 1994, the Commission released a *Policy Statement*, 9 FCC Rcd 929(1994) which established detailed guidelines for assessing forfeitures for EEO violations. These guidelines were based principally upon a licensee's "failure to recruit so as to attract" minority and female applicants for job openings. See 9 FCC Rcd at 933-936. The *Policy Statement* reaffirmed the Commission's "bedrock goal" as "safeguarding the public's right to receive a diversity of views and information over the public airwaves." 9 FCC Rcd at 929. *citing Metro.* Various parties have sought reconsideration of the *Policy Statement.*[5]

In April 1994, the Commission issued a *Notice of Inquiry* which reaffirmed that the "overriding goal of our EEO rules" is the promotion of "program diversity." 9 FCC Rcd 2047 (1994). As part of this inquiry, the Commission invited comment on such questions as how small market

[5] In light of the decision in *United States Telephone Ass'n v. FCC*, 28 F.2d 1232 (D.C. Cir. 1994), the proposed forfeiture structure has not been put into effect. See *GAF Broadcasting Company, Inc.*, FCC 95-271 (July 21, 1995).

broadcasters could better attract and retain minority employees and whether there were ways to "decrease any administrative burdens placed on broadcasters . . . without decreasing the effectiveness of our broadcast EEO enforcement . . . ." Id. at 2051. Comments were submitted more than a year ago, but no subsequent action has been taken.

III. AUTHORITY

The FCC bases its authority to impose EEO requirements on its general duty to assure that the recipients of broadcast authorizations serve the "public interest, convenience and necessity." See 47 U.S.C. 307, 309. The Commission has not been expressly charged by Congress with the duty of creating an EEO program for the broadcast industry.[6]

The Second Circuit has found that:

> EEO enforcement is not the FCC's mission. Thus, it has no obligation to promulgate EEO regulations. But it does possess the power to issue such regulations in furtherance of its statutory mandate to ensure that broadcasters serve all segments of the community. See *NAACP V. FPC*, 925 U.S. 662, 670 n.7 (1976).

560 F. 2d at 531.

[6] As part of the Cable Television and Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992) Congress prohibited the FCC from revising the EEO regulations in effect on September 1, 1992, as such regulations applied to television licensees and directed the Commission to conduct a midterm review of the employment practices of TV licensees.

IV. PURPOSE

The purpose of the FCC's EEO program was initially conceived to be the prevention of discriminatory employment practices against minority applicants. See 13 FCC 2d at 769-770. Any attempt to affect programming was considered "wisely beyond the jurisdiction of the Commission," 13 FCC 2d 775, and a matter for the "conscience" of the broadcaster. *Id.* Over time, and particularly since 1976, the Commission has embraced the rationale that its EEO program is designed "to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *Report and Order*, 60 FCC2d at 229.[7] The diversity rationale is grounded in dicta from *NAACP v. FCC*, and *Metro*. In light of the fact that *Adarand* specifically overrules the standard of review adopted in *Metro*, the Commission must now carefully re-examine the purpose which its EEO requirements is intended to further.

Although the Commission has historically disavowed any claim that its EEO program serves a remedial purpose, *Adarand* makes clear that there must be a factual predicate even for nonremedial programs. "Diversity" is not an end in itself, but a means to a larger goal.

> *Adarand* does not directly address whether and to what extent nonremedial objectives for affirmative action may constitute a compelling governmental interest. At a minimum, to the extent

[7] "We do not contend that this agency has a sweeping mandate to further the 'national policy' against discrimination, nor have we sought to duplicate the detailed regulatory efforts of specialized agencies such as the EEOC. Instead we have sought to limit our role to that of assuring on an overall basis that stations are engaging in employment practices which are compatible with their responsibilities in the field of public service programming." *Report and Order*, 60 FCC 2d at 230 (footnote omitted). But see, *Notice of Inquiry*, where the Commission claims that its EEO rules "enhance access by minorities and women to increased employment opportunities which are the foundation for increasing opportunities for minorities and women in all facets of the communications industry including participation in ownership."